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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Limitations on Commercial Time) MM Docket No. 93-254
on Television Broadcast Stations)

STATEMENT OF STEVEN H. SHIFFRIN

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I am a Professor of Law at Cornell University. I have also taught in the law schools at Boston University, Harvard University, the University of Michigan, and UCLA. I am the author of The First Amendment, Democracy, and Romance (Harvard University Press 1990) (winner of the Thomas J. Wilson Award) and numerous articles on the first amendment. I am also the co-author of Constitutional Law (7th ed. 1991), one of the most widely used casebooks in the field and a co-author of The First Amendment (1991), the most extensively used casebook in the field.

* * * * *

The Commission has sought comments on the general question of whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations. In that context, it has asked for comments on the first amendment implications of any such regulation, and it has received comments to the effect that any such content regulation would be unconstitutional.¹ Those comments misperceive the commercial speech doctrine and the relationship between broadcasting and the first amendment. In my view, the Commission has full constitutional power to regulate commercial speech in a reasonable manner and none of the Court's rulings in the commercial speech area detract from that

¹. In particular, see Statement of Rodney A. Smolla in Support of the Comments of Silver King Communications, Inc. Professor Smolla relies exclusively on commercial speech cases. He does not consider the implications of his argument for the system of broadcasting, does not consider constitutional doctrine regarding broadcasting, and as I shall show, has exaggerated the place of commercial speech in the hierarchy of first amendment values.

conclusion.

The argument on the other side proceeds from an alluring premise: content regulation is hostile to first amendment values. From that premise, commentators like Professor Smolla slide easily to the conclusion that discrimination against commercial speech must be unconstitutional.

The notion that content regulation is something of which to be wary is undeniably a persistent theme in first amendment law. But it would be a major mistake to assume that content regulation is impermissible in the broadcasting arena. Congress and the Commission have strictly avoided point of view discrimination in oversight of the airwaves (as they must), but both Congress and the Commission have taken active measures to influence the content of what is presented on the public airwaves without any effective constitutional challenge. In doing so, Congress and the Commission have privileged various types of noncommercial speech over commercial speech.

I shall discuss only three examples. First consider children's television. 47 U.S.C. § 303b makes it clear to licensees that they must serve the educational and informational needs of children or suffer possible repercussions at license renewal time. A home shopping station might prefer to broadcast uninterrupted sales presentations, but the system deliberately chills their commercial speech.² A network affiliate might prefer to run programming that

². In a brush attempt to disguise the obvious, Home Shopping Network characterizes its 21-22 hours of daily sales operations as "entertainment programming." Virtually all attempts to promote

would attract more dollars from advertisers or more advertisers, but the legislature has deliberately discouraged that decision by the threat of failing to renew a license. The children's programming scheme thus discriminates against both commercial and noncommercial speech. If it is unconstitutional to discriminate

products, however, attempt to do so in an entertaining fashion. If there were an entertainment exception to the commercial speech doctrine, the exception would swallow the rule. But no case anywhere at any time has even hinted that the commercial character of speech in any way turns on the presence or lack of entertainment value.

Indeed, the Court has firmly held that speech proposing a commercial transaction falls within the commercial speech category even if it contains a message of genuine political or public interest. In Board of Trustees v. Fox, 492 U.S. 469, 473-74 (1989), for example, sellers of housewares had marketed their goods by resort to "Tupperware parties" in college dormitories. The sellers argued that their speech was outside the commercial speech category because during the course of the parties the sellers discussed matters such as how to be financially responsible and how to run an efficient home. The Court observed that "[n]o law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares," 492 U. S. at 474. The Court firmly concluded that the Tupperware party was an exercise in commercial speech:

"Including these home economics elements no more converted [the seller's] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. As we said in Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67-68 (1983), communications can 'constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. * * *' 492 U.S. at 474-75.

The sellers in Fox would in no way have been assisted if they were able to show that they interspersed their sales presentations with public service announcements. They would not have been assisted by showing that instead of discussing their products, they took a 4 1/2 minute break each hour to discuss public affairs. Whether intermittent conversation is about recipes, home economics, or even discussions of important public issues, the fact is that Home Shopping Network is a televised Tupperware party. Like a Tupperware party, it is predominantly utilized for the transmission of sales presentations. It is commercial speech pure and simple.

against commercial speech, the children's television scheme of regulation is unconstitutional.³

Second, consider the obligation of licensees to provide programming that "responds to issues of concern in the community." See Report and Order in MM Docket No. 83-670 (Television Deregulation), 98 FCC 2d 1076, 1077 (1984). Here again home shopping stations might instead wish to maintain uninterrupted sales presentations rather than meeting their obligation. Network affiliates might wish to run more lucrative programming, but the obligation remains. Moreover, it is reinforced by the existence of the Commission's reporting requirements. See *id.* at 1109. If it is unconstitutional for the FCC to engage in subject matter discrimination or to discriminate against commercial speech, the obligation of broadcasters to respond to issues of concern in their communities and any reporting requirements would be unconstitutional.

Third, consider the public broadcasting system. At the core of that system is 47 U.S.C. 399b. That section prohibits any public broadcast system from making its facilities available to any person for the broadcasting of any advertisement. If that section did not exist, the distinction between public broadcasters and commercial broadcasters would be vanishingly small. If any section of the code drives commercial advertisements off the airwaves, that is it. But few would have the temerity to suppose that the public broadcasting

³. See also 47 U.S.C. § 303a (limiting the quantity of commercials that can be presented in children's television).

system is unconstitutional! Nonetheless, if it is unconstitutional for the Congress or the FCC to discriminate against commercial speech, if the Commission can not prohibit commercial advertisements out of concern for commercialization, the public broadcasting system is unconstitutional.

Of course, the public broadcasting system is not unconstitutional, nor are the Commission's other efforts to further its mission. As the Court stated in Metro Broadcasting v. FCC, 110 S.Ct. 2997, 3010 (1990):

"We have long recognized the '[b]ecause of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.' Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). The government's role in distributing the limited number of broadcast licenses is not merely that of a 'traffic officer;' rather, it is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience and that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.' Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission [and is consistent with] 'the ends and purposes of the First

Amendment.'"⁴

The Commission's power is particularly strong when it addresses commercial speech, for as the Court stated in Board of Trustees v. Fox:

"Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of first amendment values,' and is 'subject to modes of regulation that might be impermissible in the realm of noncommercial expression.'"⁵

It would turn the first amendment upside down to suppose the Commission has the power to regulate noncommercial speech (consider the reaffirmation of Red Lion in Metro), but is denied the power to regulate commercial speech. There is no indication anywhere in our jurisprudence to indicate that the Supreme Court is primed to change the law of broadcasting or to turn the first amendment upside down.

⁴ O'Connor, J., joined by Rehnquist, C.J., Scalia and Kennedy, JJ., dissenting, also recognized and reaffirmed government's power to regulate broadcasting: "The Court has recognized an interest in obtaining diverse broadcasting viewpoints as a legitimate basis for the FCC, acting pursuant to its 'public interest' statutory mandate, to adopt limited measures to increase the number of competing licensees and to encourage licensees to present varied views on issues of public concern. See, e.g., ... Red Lion. We have also concluded that these measures do not run afoul of the First Amendment's usual prohibition of Government regulation of the marketplace of ideas, in part because first amendment concerns support limited by inevitable Government regulation of the peculiarly constrained broadcasting spectrum. See, e.g., Red Lion."

⁵ 492 U.S. at 477 (emphasis added), quoting Ohralik v. Ohio Bar Ass'n., 436 U.S. 447, 456 (1978).

Some of the comments, however, point to cases that protect commercial speech and then leap to the conclusion that the Commission can not regulate commercialization. These comments not only fail to take into account the relationship between broadcasting and the first amendment, they also exaggerate the place of commercial speech in first amendment values.

To be sure, commercial speech enjoys a measure of constitutional protection; nonetheless, as the Court stated in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978): commercial speech is afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression."

The commentators who oppose limits on commercialization achieve no triumph when they cite cases protecting commercial speech in some contexts. None of the commercial speech cases undermine the Commission's authority to regulate commercialization. Many cases protect commercial speech in circumstances where the state seeks to shield the consumer from a particular message without sufficient justification.⁶ Thus Virginia could not shield consumers from knowledge concerning the prices of legal drugs Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Florida could not protect prospective business clients from information about the availability of an

⁶ In some circumstances, even this is permissible. See Posadas De Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986); Edge Broadcasting v. FCC, 113 S.Ct. 2696 (1993).

accountant's services. Edenfield v. Fane, 113 S.Ct 1792 (1993);⁷ Arizona could not paternalistically protect consumers from attorney advertising, Bates v. State Bar of Arizona, 433 U.S. 350 (1977). A restriction on the quantity of commercials (for example, to make more room for programming), however, is untouched by these cases because a restriction on quantity is not hostile to any particular message.⁸

Other comments point to the Court's opinion in Cincinnati v. Discovery Network, Inc., 113 S.Ct 1505 (1993). The Court there ruled that Cincinnati could not deny access to newsracks for publications classified as commercial speech in circumstances where it afforded access to publications classified as non-commercial speech. The Court observed that the interests in safety and aesthetics were at least equally affected by non-commercial publications as well.⁹ The problem was presented by the newsracks, not by the publications in the newsracks. There was simply no basis for distinguishing between commercial and non-commercial publications in that context.¹⁰

Justice Stevens characterized the Discovery Network case as

⁷. Ohio could prevent in person solicitation by personal injury attorneys in order to protect the consumer. Ohralik, supra. The distinction between the two cases is that the potential business clients of accountants are more savvy than personal injury victims.

⁸. These cases

⁹. Id. at 1514-15.

¹⁰. See id. at 1514 (emphasis in original): "[T]he distinction bears no relationship whatsoever to the particular interests that the city asserted."

narrow even with respect to newsrack ordinances. No Justice expressed the hope or registered the fear that this newsrack case had anything to do with the regulation of broadcasting. Nonetheless, the advertising community began to claim that commercial speech was now fully protected. Or as some of the comments claim, "[R]ecent Supreme Court opinions have effectively eroded any significant legal distinction between the two."¹¹

But this is simply wrong. Significantly absent from the roster of these "recent" cases is the most recent commercial speech case: Edge Broadcasting v. FCC, 113 S.Ct. 2696 (1993). Two months after Discovery Network, Edge Broadcasting upheld a prohibition on the broadcast of lottery advertising in states that prohibited lotteries. The Court upheld the prohibition on an extremely relaxed showing. The Court held that Congress had a substantial interest in supporting the policies of lottery and non-lottery states and that the statutes could be upheld even if its application to Edge Broadcasting approved only marginal advancement of the lottery state's interest.¹² The Court reaffirmed that the Constitution "affords a lesser protection to commercial speech than to other constitutionally guaranteed expression." Id. at 2703, citing Fox, supra; Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980); Ohralik, supra. Moreover, the Court again applied the Central Hudson test, a test that it has applied for

¹¹. Smolla, supra note 1, at 10.

¹². Id. at 2704.

thirteen years.¹³ It reaffirmed the principle that restrictions on the content of commercial speech¹⁴ should not be judged by standards more stringent than those applied to time, place, or manner restrictions of noncommercial speech.¹⁵ In short, the holding and express analysis of Edge Broadcasting make it abundantly clear that the comments suggesting that commercial speech is now treated the same as noncommercial speech are just wrong.

Thus, Discovery Network and Edge Broadcasting, two cases decided by the same Court in the same term, illustrate the contextualized pattern of decisionmaking in the commercial speech area.¹⁶ Discovery Network counsels that regulation of commercial speech must be reasonable; to read more into it misreads the law.

Similarly, I do not mean to imply that the Commission has arbitrary power to regulate commercial advertising. From what I have said, it follows, for example, that arbitrary point of view restrictions would be unconstitutional. The Commission could not permit advertisements for Chevrolets while banning advertisements

¹³. Discovery Network also reaffirmed the Central Hudson test (*id.* at 1510).

¹⁴. Recall that the case involved a prohibition on the content of advertising, *i.e.*, no lottery advertising.

¹⁵. Restriction on the content of noncommercial speech are ordinarily tested by much more demanding standards than those applied to time, place, and manner restrictions. Indeed much of the struggle in the cases by those who would protect speech is to avoid the less demanding time, place, and manner test. See, *eg.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁶. See also note 7 supra.

for Ford's automobiles. It clearly has the power, however, to make the same decision the first amendment makes: commercial speech is less important than much noncommercial speech.¹⁷ It, therefore, could certainly have decided that home shopping stations were less worthy of spectrum space than other available uses.¹⁸ As Metro Broadcasting observed, the FCC is not just a traffic cop.

Moreover, much permissible regulation of commercial speech has

¹⁷. Of course, informational speech such as drug price advertising can contribute to the consumer. Most televised commercial spots, however, seem to communicate little information. In any event, it is a little bizarre to suppose that people watch Seinfeld so they can catch the commercials, or that the viewing public's first amendment rights would be diminished if the quantity of commercials were limited. As to the argument that the market will assure the number of commercial minutes will be limited, it is unclear what harm would flow from regulation that would assure the result the Commission hopes will be achieved. The question, of course, is not the average minutes across all shows, but the minutes in every individual show.

¹⁸. I am afraid that the failure of the Commission to appreciate this in the home shopping context will needlessly jeopardize the already fragile case for must carry legislation. It is one thing to decide that home shopping station's service is of public interest. It is quite another to grant must carry status. Must carry rules have been declared unconstitutional on more than one occasion. It is already claimed that government is wrongly substituting its conception of good speech for that which would be chosen in the editorial discretion of the cable operator. What better present could be provided to a litigator opposing must carry legislation than the granting of privileged access to cable for channels predominantly utilized for sales presentations? What litigator will not use the forced imposition of 21-22 hours of commercialism a day on a cable operator as exhibit A in an attempt to show that the private editorial discretion of cable operators are superior to those mandated by big government? Why should not the cable operator decide which home shopping service, if any, to use in its community? Those who seek to defend must carry legislation will have a hard enough road to hoe without providing this kind of litigating advantage to their opponents. The granting of privileged access to cable for home shopping channels is a river boat gamble that any friends of must carry should not have taken. If any aspect of the home shopping inquiry deserves to be reconsidered, this is it.

little to do with evaluating the programmatic worth of commercial advertisements. As the Carnegie Commission wisely observed,

We recognize that commercial television is obliged for the most part to search for the uniformities within the general public, and to apply its skills to satisfy the uniformities it has found. Somehow we must seek out the diversities as well, and meet them, too, with the full body of skills necessary for their satisfaction.¹⁹

Advertiser domination of commercial television undermines the independence of broadcasters. The most serious problem from the Commission's perspective may have less to do with the message communicated by advertisements but the power of advertisers in insisting that broadcasters steer clear of certain controversies or treat them with kid gloves.²⁰ Advertiser dominance stifles

¹⁹. Carnegie Commission on Educational Television, Public Television: A Program For Action 13-14 (1967).

²⁰. Abortion is a subject that entertainment television will rarely consider. As the New York Times put it: The subject of abortion makes networks and advertisers so uneasy that the rare occasion it has been mentioned on a show characters twist themselves into elocutionary contortions rather than actually say the word. Even the razor tongued Murphy Brown did not use the word during an episode about whether to continue her pregnancy. Jan Hoffman, TV Shouts "Baby" (and Barely Whispers "Abortion"), The New York Times, May 31, 1992, at 27.

Homosexuality also makes advertisers nervous. For example, when "thirty something" aired an episode focusing on a one-night-stand between two gay characters, ABC lost \$1,000,000 in lost advertising. When the two characters reappeared on the show in the course of the depiction of a New Years Eve party attended, they briefly discussed their one-night-stand and gave each other a midnight kiss on the cheek. For this episode, ABC lost \$500,000. When Gay Means Loss of Revenue, Los Angeles Times, Dec. 22, 1990, at F1. Because of concern about the possibility of advertiser

diversity, and cases like Metro Broadcasting make it abundantly clear that promoting broadcast diversity is a vital governmental interest.

Conclusion

One of the oddest suggestions is that the multiplicity of new channels through cable and other technologies undercuts the power of government to regulate. From a first amendment perspective the argument cuts exactly the other way. When broadcasting was the only game in town, the consequences of governmental regulation were enormous. Today the consequences are less severe. If cable is essentially unregulated and broadcast is regulated, we get the

withdrawals, "producers frequently discuss the plots of their shows with a network before filming begins." Kevin Goldman, NBC to Hold Show's Producers Liable For Advertiser Response to Gay Plot, The Wall Street Journal, Sept. 30, 1991, at B4, col. 3. Jeff Saganaky, president of CBS Entertainment maintains, as an industry publication put it, that advertisers are "increasingly reluctant to back hard hitting shows because special interest groups are more active in threatening boycotts." BROADCASTING, Feb. 15, 1993, at 12.

See MARK CRISPIN MILLER, BOXED IN: THE CULTURE OF TV 13 (1980) (emphasis added):

"In 1959[,] one adman wrote a letter to Elmer Rice, explaining why the agency would not support a series based on the playwright's early realist drama *Street Scene*:

'We know of no advertiser or advertising agency of any importance in this country who would knowingly allow the products which he is trying to advertise to the public to become associated with the squalor . . . and general 'down' character . . . of *Street Scene*. . . . On the contrary, it is the general policy of advertisers to glamorize their products, the people who buy them, and the whole American social and economic scene.'"

advantages of an unregulated and a regulated world.²¹

It is important to distinguish the policy argument from the first amendment argument in this context. The FCC may not have the stomach for regulating commercialism at this time; it may not think it is necessary. But it would be dangerous to rest any such decision on first amendment grounds. To rest such a decision on first amendment grounds would put important features of the statutory scheme at risk - from children's television to public broadcasting.

Moreover, any such argument would seriously overestimate the importance of commercial speech in first amendment law. The first amendment protects the dissenters, those who would challenge existing customs, habits, and institutions. It protects the citizen critic participating in a democracy. But commercial speech has always been a stepchild in the first amendment family. Indeed, for most of our history, speech hawking products has been afforded no first amendment protection; it has never received generous first amendment protection. The Commission may not wish to move against advertiser domination of the broadcast media at this time, but nothing in the first amendment prevents it from doing so.

Respectfully submitted,



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²¹. Compare Bollinger, Freedom of the Press and Public Access, 75 Mich. L. Rev. 1 (1976).